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No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL HUWALDT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Michael Huwaldt, (hereinafter, defendant) prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

ORDER BELOW

The order of the Court of Appeals, unpublished per Seventh Circuit Rule 35, is reprinted as Appendix A, *infra*.

JURISDICTION

The Order of the Court of Appeals was entered on April 7, 1980. Defendant's timely petition for rehearing and suggestion for rehearing in banc was denied on May 16, 1980. (App. B, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22(2) of the Rules of this Court.

QUESTIONS PRESENTED

1.

The defendant's rights to due process of law and against unreasonable searches and seizures was violated in the manner of execution of a search warrant three hours before its issuance. The court, absent findings of fact, improperly ruled against the defendant at the hearing to quash the warrant.

2.

The defendant's rights to due process of law and against unreasonable searches and seizures was violated when the court held that although a search was illegal, the error committed by the court in allowing the illegally acquired evidence to be presented to the jury was not harmless beyond a reasonable doubt.

3.

The defendant's rights to due process of law was violated when the government failed to produce tapes, a copy of a confession or statement of the defendant, prior to trial. The court also denied the defendant's rights to due process of law, against self-incrimination, and his right to counsel by failing to suppress statements.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides, in pertinent part:

"No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Rule 16 of the Federal Rules of Criminal Procedure reads, in pertinent part:

"(A) Disclosure of Evidence by the Government.
(1) Information subject to disclosure
(A) Statement of defendant.
Upon request of a defendant, the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant, whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent."

STATEMENT OF THE CASE

Defendant was charged with conspiracy to distribute and distributing a controlled substance (Counts I-V) and with the possession of a controlled substance with intent to deliver (Count VII) and with possession of a weapon while violating a federal felony, all in violation of Title 18, U.S.C. 924(c)(2) and Title 21, U.S.C. 841(a)(1) and 846. The defendant was found guilty of Counts I, II, V, VI and VII and he was acquitted of Counts III and IV.

The defendant was sentenced to imprisonment for a term of six years on Counts I, II, V and VII of the indictment. Imposition of the sentence on Count VI of the indictment was suspended and Mr. Huwaldt was placed on probation for a period of five years, to be served consecutive to the term of imprisonment. The defendant was further ordered to serve a special parole term of eight years on Counts I, II, V, and VII to run consecutive to the imprisonment.

On appeal, the defendant directed the court's attention to inadequacies in the affidavit for the search warrant; the illegal execution of the search warrant; the admission of illegally seized evidence without a warrant after the search of his car; the failure of the court to exclude evidence pursuant to Rule 16 of the Federal Rules of Criminal Procedure because of the failure of the government to comply with court orders; the admission of a statement of the defendant acquired illegally and other points not pertinent to this cause. The court affirmed (Appendix A).

STATEMENT OF FACTS

The facts, as they apply to each point, are set forth in the body of the brief. Briefly, the Circuit Court of Appeals held that the search of the defendant's trunk and cases in the trunk was illegal but the admissibility of the fruits of the search was not prejudicial beyond a reasonable doubt. These items were extremely numerous including scales and packaging equipment for drugs. The court also acknowledged the illegal search of a carrying case that had drugs in it and was referred to by the government as the defendant's "sample case." DEA agents subsequently searched the defendant's home and his garage, three hours prior to the issuance of a search warrant and appropriate findings of fact were not made by the court to clearly define the court's ruling. The Circuit Court of Appeals did not grant to the defendant appropriate consideration based upon a lack of a court finding of facts in the cause. The government intentionally withheld from the defendant numerous tapes of conversations between agents and the defendant until the day of trial and withheld the existence of an alleged oral statement of the defendant until the middle of the trial. Motions for continuances by the defendant, because of a violation of Rule 16, were denied; motions for exclusion of evidence based upon a violation of Rule 16 were denied and the defendant's motion to suppress the statements was denied, even though he affirmatively exercised his Fifth and Sixth Amendment rights at the time of his arrest.

REASONS FOR GRANTING THE WRIT

1.

THE EXECUTION OF THE SEARCH WARRANT VIOLATED THE DEFENDANT'S RIGHTS TO DUE PROCESS AND TO HIS RIGHTS AGAINST UNREASONABLE SEARCHES AND SEIZURES.

Law enforcement officials forcibly entered the defendant's home at 7:30 p.m., and arrested the defendant's fiancee and a friend, and held them in the home for a period of approximately four hours. The entrance to the home, and the arrest of the occupants, was accomplished without benefit of a warrant. No violations of the law were occurring at the time. One DEA agent stated that the home was searched at that time. Another DEA agent denied it. Both occupants of the home stated the home was thoroughly searched. Both DEA agents stated they had been told that a warrant was being acquired to search both the home and the garage.

A warrant was acquired for the search of the garage only at 10:15 p.m. on the same evening. The clear testimony of the occupants of the home is that the actual penetration into the garage was made at 9:00 p.m., a full hour and fifteen minutes before the warrant was issued in downtown Chicago approximately twenty miles away. One of the agent's reports stated clearly that the search had taken place at 9:00 p.m. The inventory of the search, which had all of the items which were seized from the garage, was completed, dated and signed with a time notation of 10:30 p.m. (only fifteen minutes after its issuance). It is conceded by all parties that the search execution took about an hour and a half.

The law enforcement officials all admit that the warrant was not at the scene of the search when the search took place. It is the agents' position that the search was not started until 10:15 p.m. No findings of fact were made by the court.

This Court has stated on numerous occasions, that the constitutional provisions for security of person and property should be liberally construed in favor of the citizen abused, *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 222, 29 L.Ed. 2d 564 (1971); *Kerr v. State of California*, 374 U.S. 23, 83 S.Ct. 1623, 23 L.Ed. 2d 726 (1963). This Court recently reaffirmed that position in the case of *Payton v. New York*, ... U.S. ..... , 100 S.Ct. 1371, ... L.Ed. 2d ..... (1980), and indicated that the physical entry of the home is the "chief evil" against which the wording of the Fourth Amendment is directed.

Clearly, the defendant's Fourth Amendment rights were violated by the reckless entrance into the home and the seizure of those premises, and the arresting of the individuals in those premises. That is the time that the execution of the search warrant began, 7:30 p.m. in the evening. The court, by failing to make findings of fact, totally debilitated the defendant's rights under the Fourth Amendment and to due process under the Fifth Amendment.

It was factually conceded by everyone that the search of the garage took place without the benefit of process of any type at the location. This Court should undertake the review of this matter because of its singularly important effect on the Fourth Amendment rights of the defendant.

2.

THE COURT IMPROPERLY HELD THAT THE ADMISSION OF THE FRUITS OF TWO CONCEDEDLY ILLEGAL SEARCHES WAS HARMLESS BEYOND A REASONABLE DOUBT THUS VIOLATING THE DEFENDANT'S RIGHTS TO DUE PROCESS AND, AGAINST UNREASONABLE SEARCHES AND SEIZURES.

The Circuit Court of Appeals conceded that two searches were illegal, one of a tool box in the trunk to the defendant's vehicle and another of a leather carrying case of the defendant. Found in the two illegal searches were a vial of PCP, scales, zip loc bags, adhesive tape, all paraphernalia involved in the drug business. The government in argument referred to the paraphernalia as the equipment of a drug dealer and the leather case was referred to as the "sample case". These highly prejudicial items were admitted against the defendant in spite of this Court's holding in the case of *State of Arkansas v. Lonnie J. Sanders*, ... U.S. ..... , 99 S.Ct. 2586, ... L.Ed. 2d ..... (1979). This Court's holding in the *Sanders* case grants to the defendant substantial Fourth Amendment rights. By holding the error to be harmless beyond a reasonable doubt is to invade the function of the jury. It must be remembered that in the case at bar, two of the counts charging delivery of a controlled substance ended in acquittals by the jury. At the trial it became evident that the co-defendant who was the person who actually made the sales to DEA agents had other sources of supply. The defendant Huwaldt never met the agents face to face at any time during the alleged sales.

3.

THE DEFENDANT'S RIGHTS TO DUE PROCESS OF LAW WERE VIOLATED WHEN THE COURT FAILED TO TAKE APPROPRIATE SANCTIONS BECAUSE OF THE GOVERNMENT'S INTENTIONAL VIOLATION OF RULE 16.

The defendant filed timely motions for discovery prior to trial. The government responded by stating that the defendant had made "no statements". After hearings progressed on motions to suppress, the day before trial, on cross-examination the defendant established that the government was possessed of tapes of conversations between the defendant and a government agent, which could very well lead to an entrapment defense. The government, having been found out, was ordered to turn the tapes over to the defendant. The defendant's counsel listened to the tapes, which were in bad shape and required expert "cleaning up" before they could be intelligently used. The defendant made a motion for a continuance, which was denied.

During the middle of the trial, the government attempted to put in a confession or inculpatory statement of the defendant. The defendant again objected stating that the government had answered his discovery motion in writing and stated that there were no statements of the defendant. The defendant again made a motion for a continuance, which was denied. The hearing quickly deteriorated into a trial by ambush. See *United States v. Kelly*, 420 F.2d 26 (2d Cir. 1969). In the *Kelly* case, the court was confronted with a similar situation, where the government indicated they had no information to submit to the defendant.

In the case of *United States v. Bryant*, 439 F.2d 642 (D.C. 1971), a factual situation very similar to the case

at bar arose. That case involved a conspiracy and substantive charge drug case. The sales again were directed by DEA agents. In the *Bryant* case, the government failed to turn over tape recordings of conversations between the co-defendants and the government agent (exactly as we have in the case at bar). The Circuit Court of Appeals stated that it was an abuse of discretion for the court not to consider taking substantial sanctions in light of the facts of the case. The court stated:

> "The purpose of the duty, to turn over evidence by the government, is not simply to correct an imbalance of advantage, whereby the prosecution may surprise the defense at trial with new evidence; rather, it is also to make of the trial a search for truth informed by all relevant material, much of which, because of imbalance and investigative resources, will be exclusively in the hands of the government." Citing *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963).

Here we have a direct conflict between the Circuit Court of Appeals for the District of Columbia and the Seventh Circuit. The Seventh Circuit saw fit to take no sanctions at all, even though the defendant was at all times timely in his requests prior to trial and timely in directing the court's attention to the impropriety of the government's conduct during trial.

In *United States v. Maynard*, 476 F.2d 1170 (D.C. 1973), the court held that the government had a duty to preserve and turn over certain notes made by government agents and stated as follows:

> "In Bryant, this court held that the government's duty of disclosure is operative as a duty of preservation which extends to all discoverable evidence defined as including all evidence which

might have to be produced under Brady or the Act. Bryant further held that sanctions for nondisclosure based on loss of evidence, will be invoked in the future unless the government can show that it is promulgated, and forced and attempted in good faith to follow rigorous and systematic procedures for preserving evidence."

If the trial of a case in federal court is to have any semblance of equality, the court must intervene in the defendant's behalf where the government has clearly violated its responsibility to turn over evidence. A failure to do so debilitates the trial to a legalistic weight lifting contest to determine which side has the most muscle.

4.

THE DEFENDANT'S RIGHTS TO DUE PROCESS, HIS RIGHTS AGAINST SELF-INCRIMINATION AND HIS RIGHT TO AN ATTORNEY WERE VIOLATED WHEN THE COURT FAILED TO SUPPRESS AN INCULPATORY STATEMENT MADE BY HIM.

After the court failed to take sanctions under Rule 16 because of the failure to inform the defendant of the existence of a statement, the defendant filed a motion to suppress evidence. A hearing was had out of the presence of the jury. Admitted into evidence was a printed waiver form which the defendant was asked to sign. The defendant wrote clearly across the waiver form "I do not waive my rights." The defendant also testified that he was interrogated by numerous agents that evening that were not brought in to testify against the defendant. He stated that he requested an attorney on half a dozen occasions from three agents who did not testify to rebut the defendant.

He further stated that numerous other named agents had made promises of leniency to him, if in fact he would make a statement. These agents also were not called to rebut the testimony by the government.

The conduct of the court in failing to suppress the inculpatory statement of the defendant was clearly in violation of this Court's mandate of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 776 (1966). Subsequent conduct of the law enforcement officials in failing to rebut the defendant's testimony, that numerous promises were made to him by specific law enforcement officials and that he requested an attorney on numerous occasions from numerous named law enforcement officials violates the dictates of this Court in *Simms v. Georgia*, 389 U.S. 404, 88 S.Ct. 523, 19 L.Ed. 2d 634 (1967). It is unrebutted and unchallenged that he did in fact invoke his Fifth and Sixth Amendment rights, that promises were made to him, but the statement was placed into evidence before the jury. The conduct of the Circuit Court of Appeals is in direct violation of the case of *United States v. Nielsen*, 392 F.2d 849 (7th Cir. 1968). The explicit statement in the *Nielsen* case as to the invocation of Fifth and Sixth Amendment rights was not as explicit, or as to the point, as in the case at bar.

CONCLUSION

For any or all of the reasons herein advanced, certiorari should be allowed, and the defendant's conviction should be reversed or reversed and remanded.

Respectfully submitted,

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APPENDIX A

Unpublished Order Not To Be Cited Per Circuit Rule 35

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued: January 8, 1980

April 7, 1980.

Before
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN W. PECK, *Senior Circuit Judge**
Hon. PHILIP W. TONE, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 79-1591 vs.

MICHAEL HUWALDT,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-CR-857—JOHN POWERS CROWLEY, *Judge.*

ORDER

Michael Huwaldt was convicted by a jury of drug distribution offenses and unlawful possession of a firearm during commission of a felony. He argues that searches occurring on the day of his arrest violated his Fourth

* The Honorable John W. Peck, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

Amendment rights and that admission at trial of the fruits of the searches was reversible error. He also argues that other trial errors occurred. We affirm the conviction.

Huwaldt was found guilty of conspiring to distribute phencyclidine (PCP); of distributing PCP on September 20, 1978; of possessing PCP with intent to distribute on November 21, 1978; of possessing cocaine with intent to distribute on November 21, 1978; and of unlawfully carrying a firearm while possessing PCP with intent to distribute on November 21, 1978.[1] The evidence showed that Huwaldt was the source of supply for sales of PCP made by his codefendant Glenn Richards to federal Drug Enforcement Administration undercover agent William Morley on the above dates. Richards was not tried with Huwaldt and did not appear as a witness. The evidence against Huwaldt included PCP and other articles seized in searches conducted on November 21, 1978, the date of Huwaldt's arrest.

The Warrantless Search of the Automobile and its Contents

DEA agents made a warrantless arrest of Huwaldt while he was in his automobile. The legality of the arrest is not challenged. A search of his person and his car at that time yielded several items. On his person were a handgun and a piece of paper listing some local chemical companies, one of which was a large manufacturer of PCP. On the floor of the car in front of the driver's seat was a Kleenex box from which protruded a plastic bag containing fourteen ounces of PCP. Upon opening the car's trunk, the agents found a closed metal tool box, which they immediately opened. It contained scales suitable for weighing narcotics, ziploc

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[1] The acts charged are violations of 21 U.S.C. §§ 841(a)(1) & 846 and 18 U.S.C. § 924(c)(2). Huwaldt was found innocent on two counts of distributing PCP on September 26 and November 21, 1978 in violation of 21 U.S.C. § 841(a)(1).

plastic bags commonly used for packaging narcotics, and adhesive tape. A large brown purse lying on the passenger side of the car's front seat was not opened until later, when an agent inventoried the car's contents. It was found to contain a small vial of PCP.

The Search of Huwaldt's Garage Pursuant to a Search Warrant

A few hours after Huwaldt's arrest, DEA agents, acting under a search warrant of which they learned by telephone, searched the unattached garage at Huwaldt's residence at 5030 West Jarvis Avenue, Skokie, Illinois. They found a large quantity of cocaine, a recipe for the manufacture of PCP bearing Huwaldt's fingerprints, an empty lactose bottle, and a spoon.

I.

The Admission of the Evidence Seized in the Warrantless Searches of the Tool Box and the Purse

Huwaldt contends that *Arkansas* v. *Sanders,* 99 S.Ct. 2586 (1979), requires the exclusion of both the contents of the metal tool box found in the trunk and the small vial of PCP found inside the purse. The government apparently concedes that the searches uncovering these items are improper under *Sanders,*[2] but argues that Huwaldt did not preserve this point for appeal, that *Sanders* should not be applied retroactively to exclude evidence seized before that decision was rendered, and that any error in the admission of this evidence was harmless beyond a reasonable doubt. We hold that the point was not waived but find any error harmless. We therefore need not reach the retroactivity issue.

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[2] Thus, we assume without deciding that Huwaldt's expectation of privacy in a closed tool box in the trunk of a car is analogous to that of Lonnie Sanders in a closed suitcase in the trunk of a car. *See Arkansas* v. *Sanders, supra,* 99 S.Ct. at 2593-94

(footnote continued on following page)

(Appendix A)

Although the government is correct in its assertion that the defendant did not specifically question the propriety of the seizure of these items in its motion to suppress or in the suppression hearing before trial, Huwaldt's motion to suppress evidence illegally seized at the scene of the arrest is broad enough to include objections to the seizure of these items.

We hold that the admission of the vial of PCP and the scales, ziploc bags, and adhesive tape found in the tool box was harmless error. During their surveillance of Richards on September 20, DEA agents observed two transactions between Richards and Agent Morley. On each occasion Huwaldt was the only person whom Richards met between Morley's offer to buy PCP from Richards, who did not have any PCP in his possession, and the later sale. The PCP in the second sale was delivered by Richards inside a folded Penney's catalog with a mailing label bearing the name of Huwaldt's father and the 5030 West Jarvis address. On November 21 DEA agents observed Huwaldt and Richards meeting shortly after Richards had told Morley that his source had agreed to supply the fourteen ounces of PCP that Morley wanted to buy. The two were arrested while in Huwaldt's car. A plastic bag containing fourteen ounces of PCP was found protruding from a Kleenex box on the floor in front of the driver's seat. In Huwaldt's pocket was

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2 *Continued*
n.13. *Compare United States* v. *Dien*, 609 F.2d 1038 (2d Cir. 1979) (applies *Sanders* to partially sealed large cardboard boxes out of sight in back of van); *United States* v. *Bella*, 605 F.2d 161 (5th Cir. 1979) (per curiam) (applies *Sanders* to guitar case); *United States* v. *Meier*, 602 F.2d 253, 255 (10th Cir. 1979) (applies *Sanders* to closed unlocked backpack) *with United States* v. *Neumann*, 585 F.2d 355, 360-61 (8th Cir. 1978) (refuses to apply *Chadwick*, because insufficient expectation of privacy in closed, unsealed department store box); *United States* v. *Gaultney*, 581 F.2d 1137, 1144-45 (5th Cir. 1978) (refuses to apply *Chadwick* to taped Scrabble box because no expectation of privacy).

a list of some local chemical companies, one of which manufactured an important ingredient of PCP. In addition, the search of the garage at Huwaldt's residence later that day disclosed a set of instructions for the manufacture of PCP bearing Huwaldt's fingerprints, an empty lactose bottle, a large quantity of cocaine, and a spoon. Finally, Richards indicated to Morley that he could contact his source through use of a "beeper," and Huwaldt had signed a contract for beeper services. In light of all this evidence, the admission of the cumulative evidence found in the tool box and the purse was harmless beyond a reasonable doubt.

II.

The Admission of the Evidence Seized in the Warrantless Search of the Automobile Itself

Huwaldt also argues that the plastic bag containing fourteen ounces of PCP should have been excluded because seized in a search beyond the permissible limits for warrantless searches incident to an arrest. He relies on *Chimel* v. *California,* 395 U.S. 752 (1969). This seizure was justified, however, under both the plain view and automobile search exceptions to the warrant requirement. Viewed most favorably to the government, *see Glasser* v. *United States,* 315 U.S. 60 (1942), the facts shown at trial indicate that the law enforcement personnel had a right to be where they were when they first saw the bag, that its discovery was inadvertent, and that it was immediately recognizable as evidence. *Harris* v. *United States,* 390 U.S. 234, 236 (1968); *Ker* v. *California,* 374 U.S. 23, 42-43 (1963). Even assuming the facts were found as Huwaldt has argued, that the bag was under the front seat and thus not in plain view, the seizure was justified under the automobile exception to the warrant requirement because of Huwaldt's diminished expectation of privacy in the car. *United States* v. *Chadwick,* 433 U.S. 1, 12 (1977); *Chambers* v. *Maroney,* 399 U.S. 42 (1970).

(Appendix A)

III.

The Admission of Evidence Seized in the Search of the Garage Pursuant to a Search Warrant

Huwaldt alleges several errors relating to the search conducted on the day of his arrest by federal Drug Enforcement Administration agents and Chicago Police Department officers of the unattached garage at his residence.

Huwaldt first contends that the affidavit for the search warrant failed to state probable cause to search the garage. It is clear, however, that the affidavit does show probable cause. A DEA agent observed the delivery of a major precursor of PCP to the garage. DEA surveillance together with statements of Huwaldt's codefendant Richards to DEA undercover agent Morley during three sales of PCP established facts stating probable cause to believe that Huwaldt was the source of the PCP. Then on November 21, 1978, Morley called Richards to arrange a purchase. Richards indicated that he would call his source on a "beeper." One-half hour later Richards told Morley over the phone that he had contacted his source, whom he would meet twenty minutes later to obtain the PCP. DEA surveillance established that Huwaldt was at all times from the initial conversation between Richards and Morley until ten minutes after the second conversation inside the garage at his residence. Huwaldt was then observed driving directly to a meeting place with Richards, where they were both arrested and a plastic bag containing the exact amount of PCP desired by Morley was seized. Along with other trips observed by DEA agents by Huwaldt to the garage prior to PCP sales, this incident establishes in sufficient factual detail probable cause to search the garage.[3]

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[3] This case is substantially different from *Spinelli* v. *United States*, 393 U.S. 410 (1969), where the Supreme Court found inadequate an affidavit that stated baldly that "a confidential

(footnote continued on following page)

Huwaldt next argues that the entry of agents into his residence approximately three hours prior to the execution of the search warrant was unlawful. He argues that the entry was obtained without permission and only through the use of force and that the law enforcement officials did not first give proper notification as to the purpose and authority for their entry. However, we must construe the factual record in a light most favorable to the government, *see Glasser* v. *United States,* 315 U.S. 60 (1942), and we find sufficient evidence to support a conclusion by the district court that entry was not obtained through use of force.[4] Also, the evidence can support a conclusion that the house was never searched, and it is undisputed that no evidence was ever seized from the house. Thus we conclude that the police did not force their way into the house illegally and that their intrusion into the house provides no basis for requiring the suppression of evidence obtained from the search of the garage.

Huwaldt next argues that the search of the garage took place before the warrant was issued. This is a question of fact, however, and sufficient evidence exists in the record to support a conclusion that the search did not begin until after the warrant issued.

Huwaldt also contends that the search of the unattached garage was unlawful because the law enforcement person-

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[3] *Continued*
reliable informant" had told police that a defendant was using two telephones for bookmaking, and corroborated that statement only with law enforcement personnel's general knowledge that defendant was a bookmaker, the alleged defendant's ownership of two telephones, and a catalog of defendant's movements. The Court found that the informant's tip had not been sufficiently bolstered by specific information indicating the reliability of the informant and by a showing of the specific underlying circumstances from which the informant had concluded that Spinelli was running a bookmaking operation.

[4] The district court did not make explicit findings of fact with respect to his denial of the motions to suppress.

nel did not have the warrant on the premises at the commencement of the search. No authority is cited for this proposition, and we have found none. *United States* v. *Woodring,* 444 F.2d 749, 751 (9th Cir. 1971), held that starting a search after the agents at the scene knew the warrant had been issued but before its delivery was permissible when there was no resistance to the search and the warrant arrived and was served before the officers removed the seized articles from the place of the search. We follow that precedent here.

IV.

Other Alleged Trial Errors

Huwaldt's remaining allegations of error deal with rulings during the trial. The most important allegation is that the trial court erred in refusing either to exclude certain items or to grant the defense a continuance because of government violations of Rule 16 of the Federal Rules of Criminal Procedure.

The first group of those materials were tapes of conversations between Huwaldt and a DEA confidential informant and reports concerning codefendant Richards' drug sales to a DEA undercover agent one month prior to Huwaldt's first alleged criminal act, sales that did not involve Huwaldt. Before trial the government was ordered to produce all statements or admissions or confessions of the defendant. In addition, Huwaldt specifically requested materials that would indicate that Richards was violating the law without the knowledge of Huwaldt. The government nevertheless did not provide the tapes and reports until the day before trial began. With respect to the tapes, the government's position was that they pertained only to the manufacture of PCP and thus were irrelevant to the distribution charge. Similarly, the government contended at trial that any evidence indicating prior sales by Richards

to DEA agents from sources of supply other than Huwaldt was irrelevant.

While we might question the government's narrow view on questions of relevance, we can reverse only if Huwaldt was prejudiced by the late delivery of the material coupled with the denial of a continuance. A district court has broad discretion in ruling on a motion for continuance. A showing of abuse of discretion must include a showing of prejudice. *See United States* v. *Bockius,* 564 F.2d 1193, 1196 (5th Cir. 1977); 1 C. Wright, *Federal Practice and Procedure (Criminal)* § 261 (1969).

Huwaldt has failed to show prejudice. As to the tapes, which concerned sales by the confidential informant to Huwaldt of a major precursor of PCP, Huwaldt's counsel was fully advised of that transaction in the affidavit attached to the search warrant, and he was able to interview the informant independently. In addition, he has not made a representation that the tapes, which apparently are of poor quality, could in fact be reduced to useable form by an electronics expert, much less a showing of how the contents of the tapes, if known to him earlier, might have affected the trial's outcome. *See United States* v. *Medina-Arellano,* 569 F.2d 349, 354-55 (5th Cir. 1978). With respect to the reports concerning Richards' independent sales to DEA agents one month before the first transaction included in Huwaldt's indictment, the defendant has also shown no prejudice. His request for those materials was based on the theory that Richards had sources of supply other than Huwaldt and thus that the government's circumstantial evidence tending to point toward Huwaldt as the source for the transactions charged in the indictment was not sufficient for proof beyond a reasonable doubt. Yet Huwaldt was able during the course of the trial to bring out evidence that Richards had other sources of supply and indeed effectively presented the argument to the jury during his closing statement. He does

not show how having the reports earlier would have measurably enhanced his presentation of this line of defense. Thus we affirm the trial court's denial of defendant's motion for a continuance after receiving these tapes and reports at the commencement of trial.[5]

Defendant also argues that he was improperly ambushed later in the trial by the introduction into evidence of a notebook or address book containing incriminating telephone numbers. Yet Huwaldt again has failed to show any specific prejudice resulting from any government failure to apprise him of the address book prior to trial.

Defendant next contends that the trial court erred in failing to suppress defendant's oral statements to police, both because of their nondisclosure prior to trial and because of defendant's affirmative non-waiver of his *Miranda* rights. However, defendant was acquitted on the only count to which those statements were relevant, so their admission, if indeed error, was clearly harmless beyond a reasonable doubt.

Huwaldt also contends that the trial court erred in failing to grant a mistrial after the government implied that he did not make a statement after he was given his Fifth and Sixth Amendment rights, an admittedly improper implication, *United States* v. *Kroslack,* 426 F.2d 1129 (7th Cir. 1970). However, all the government did here was to use one DEA agent to establish that Huwaldt had been given his *Miranda* rights, which was relevant to show that

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[5] *United States* v. *Maynard,* 476 F.2d 1170, 1176-78 (D.C. Cir. 1973), and *United States* v. *Bryant,* 439 F.2d 642 (D.C. Cir. 1971), cited by Huwaldt, concern the government's duty to preserve items that are potentially subject to a legitimate defense discovery request. In those cases, it was impossible for the defense to demonstrate prejudice with any specificity because of the loss or destruction of such items. In contrast, all items requested here were preserved, so Huwaldt has had ample opportunity to show prejudice.

statements made later to another DEA agent were voluntary. That the prosecutor switched to another subject after introducing that evidence is not sufficient by itself to permit the conclusion that the government improperly indicated that the defendant had refused to make a statement after being given his rights.

Likewise without merit is Huwaldt's contention that his motion for a mistrial should have been granted because the prosecutor indicated before the jury that the defendant could call the confidential informant as a witness. Defendant argues that this phrasing of the objection impermissibly indicated to the jury that he had the burden of calling witnesses. However, the prosecutor's infelicitously phrased comment, made during an objection to defense counsel's tactic of impeaching a witness through the statements of another whom defense counsel did not plan to call, was a trivial incident in a trial of five days' duration and thus did not require the declaration of a mistrial.

Finally, Huwaldt contends that the trial court erred in failing to hold a hearing on the existence of a conspiracy prior to the introduction of evidence under the co-conspirator's exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E). The rule in this circuit as to the method of independently proving the necessary prerequisites for use of that exception has been laid out in *United States* v. *Santiago,* 582 F.2d 1128, 1130-31 (7th Cir. 1978), which does not require a separate hearing prior to the introduction of any of this evidence. The trial court's handling of the problem clearly fell within the guidelines of *Santiago.*

Since no merit exists in any of these contentions, the judgment of conviction is hereby affirmed.

AFFIRMED.

(Appendix A)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 8, 1980.

Before
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN W. PECK, *Senior Circuit Judge**
Hon. PHILIP W. TONE, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 79-1591 vs.

MICHAEL HUWALDT,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-CR-857—JOHN POWERS CROWLEY, *Judge.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this court entered this date.

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* The Honorable John W. Peck, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

APPENDIX B

Unpublished Per Curiam Order

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 16, 1980.

Before
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN W. PECK, *Senior Circuit Judge**
Hon. PHILIP W. TONE, *Circuit Judge***

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 79-1591 vs.

MICHAEL HUWALDT,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-CR-857—JOHN POWERS CROWLEY, *Judge.*

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Michael Huwaldt, defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing, Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

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* Judge John W. Peck, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

** Judge Tone voted to deny rehearing before resigning from the bench.